United States Department of Labor
Employees' Compensation Appeals Board

DAVID S. GILREATH, Appellant	)	
and	)	**Docket No. 04-1723**
	)	**Issued: January 4, 2005**
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, Mobile, AL, Employer	)	

Appearances:
David S. Gilreath, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 29, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated January 12, March 8 and June 1, 2004, denying his claim that he sustained an employment-related emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On August 20, 2003 appellant, then a 57-year-old safety specialist, filed a claim alleging that he sustained an emotional condition due to various incidents and conditions at work. He alleged that he sustained stress because he was required to work on accident inspections and investigations which included dealing with cases of amputations and fatalities. Appellant

claimed that he had to interview distraught coworkers and relatives of accident victims and alleged that most of the time the interviewees did not seem satisfied with his investigations. Appellant asserted that a number of the investigations concerned teenagers, including a case involving a 14-year-old who fell through a sky light on July 2, 1997 and a 16-year-old whose lower arm was amputated in a meat grinder on January 16, 1992. Appellant also claimed that he had to look at videos and photographs of dead and mangled bodies as part of his job.

Appellant submitted a number of medical reports in support of his claim. In several of the reports, the physicians noted that appellant reported experiencing stress due to conducting investigations of accidents.

The record contains evidence which indicates that in November 2003, the employing establishment offered appellant a lower-grade position as a safety and occupational health specialist at nonretained pay. The evidence suggests that appellant would have been terminated from the employing establishment if he did not accept the lower-grade position.

By decision dated January 12, 2004, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors. The Office indicated that appellant had not submitted evidence showing that the alleged January 16, 1992 and July 2, 1997 accidents actually occurred, that he was actually assigned to the cases or that he performed inspections in connection with the cases.

Appellant submitted a January 12, 2004 statement in which he asserted that he accepted the lower-grade position offered by the employing establishment "under duress." He claimed that other employees received retained-pay job offers which accommodated their medical conditions and alleged that he did not receive such an offer due to racial discrimination. In a January 28, 2004 statement, appellant indicated that the accident involving the 14-year-old who died actually happened in February 2001, rather than July 1997. He stated that he was submitting evidence regarding this matter and the incident involving the 16-year-old who lost his lower arm in January 1992.

Appellant submitted a number of documents relating to safety inspections which were performed after the occurrence of accidents. Several forms concerned a fatal fall which occurred on February 3, 2001. One form, signed by appellant on July 12, 2001, indicated that an inspection of the accident site was carried out on February 5 and 6, 2001. Another form indicated that a file was opened on January 16, 1992 regarding a meat preparation company.[1]

By decision dated March 8, 2004, the Office affirmed its January 12, 2004 decision. It noted that appellant had not submitted evidence showing that he was at the accident sites "when the fatalities occurred."

In a statement dated March 18, 2004, appellant asserted that he never implied that he was at the accident sites at the time of injury. He noted that he had claimed that he arrived at a given

[1] The record was also supplemented to include a January 27, 2004 document in which an employing establishment official indicated that, given appellant's situation, it was appropriate and proper to offer him a lower-grade position.

accident site shortly after the occurrence of an accident and was required to interview coworkers and relatives of the accident victim.

By decision dated June 1, 2004, the Office affirmed its prior decisions. In an accompanying memorandum, the Office noted under the heading, "Incidents which occurred that are not factors of employment," that appellant visited sites where "accidents/fatalities had previously occurred." Under the heading, "Incidents alleged which the Office finds did not occur," the Office stated, "None."

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[2] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[4] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[5]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[6] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[4] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[5] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[6] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[7]

ANALYSIS

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decisions dated January 12, March 8 and June 1, 2004, the Office denied his emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that the employing establishment discriminated against him by offering him a lower-grade position as a safety and occupational health specialist at nonretained pay. He claimed that similarly situated employees received retained-pay job offers which accommodated their medical conditions. To the extent that incidents alleged as constituting discrimination are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[8] However, for discrimination to give rise to a compensable disability under the Act there must be evidence that discrimination did in fact occur. Mere perceptions of discrimination are not compensable under the Act.[9] In the present case, the employing establishment denied that appellant was subjected to discrimination and he has not submitted sufficient evidence to establish that he was discriminated against by the employing establishment.[10] For example, he did not submit the results of a grievance which showed that the employing establishment discriminated against him by offering him the lower-grade position. Thus, appellant has not established a compensable employment factor under the Act with respect to the discrimination.[11]

The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable.[12] In *Antal*, a tax examiner filed a claim alleging that his emotional condition was caused by the pressures of trying to meet the production standards of his job and the Board, citing the principles of *Cutler*, found that the claimant was entitled to compensation. In *Kennedy*, the Board, also citing the principles of

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[7] *Id.*

[8] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[9] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[10] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[11] In the absence of error of abuse, the handling of the personnel matters such as offering an employee a certain position is an administrative function of the employer and not a duty of the employee. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably. *See Richard J. Dube*, 42 ECAB 916, 920 (1991). Appellant has not shown that the employing establishment committed error or abuse in connection with the administrative aspects of the job offer.

[12] *See Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

Cutler, listed employment factors which would be covered under the Act, including an unusually heavy workload and imposition of unreasonable deadlines.

In the present case, the record contains evidence which shows that, as part of his required job duties, appellant was involved in investigations and inspections of accident sites shortly after the accidents occurred. Some of these investigations and inspections concerned serious injuries, including fatalities. For example, the record contains a form signed by appellant on July 12, 2001 which indicated that an inspection of the site of a fatal fall on February 3, 2001 was carried out on February 5 and 6, 2001. Moreover, the Office has accepted as factual that appellant visited sites where "accidents/fatalities had previously occurred." Therefore, he has established a compensable employment factor with regard to his visiting such accident cites.

Appellant also alleged that, as part of his duties, he had to interview distraught coworkers and relatives of accident victims and claimed that most of the time the interviewees did not seem satisfied with his investigations. He also asserted that he had to look at videos and photographs of dead and mangled bodies. As discussed above, the Board has held that the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[13] However, the Office did not address these claimed employment factors in any of its decisions. In particular, appellant's allegations emphasized the stress that he felt after interviewing distraught coworkers and relatives. The case should be remanded to the Office to consider whether these additional claimed employment factors actually constitute compensable employment factors. The Office should engage in any development it deems necessary to address these claimed employment factors.

In the present case, appellant has established a compensable employment factor with respect to visiting accident sites after accidents occurred, including occasions involving serious accidents such as fatalities. When compensable employment factors are established, the Office must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence. After the Office develops the factual aspect of the case to determine whether any other employment factors should be accepted, it should also consider whether the medical evidence shows that appellant sustained an emotional condition due to any accepted employment factor.[14] After such further development as it deems necessary, the Office should issue an appropriate decision on this matter.

CONCLUSION

The Board finds that the case is not in posture regarding whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty. The Board has accepted that appellant established a compensable employment factor with respect to visiting accident sites after accidents occurred, including occasions involving serious accidents such as fatalities. The Board has also determined that the case should be remanded to the Office in

[13] *See supra* note 6 and accompanying text.

[14] *See Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

order to carry out the factual and medical development described above, to be followed by an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 1, March 8 and January 12, 2004 be set aside and the case be remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: January 4, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member